

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Original & Affidavit of Mailing

77-1233

To be argued by
RICHARD W. BREWSTER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1233

UNITED STATES OF AMERICA,

Appellee,

—against—

EDWARD MOORE and WILLIAM LAING,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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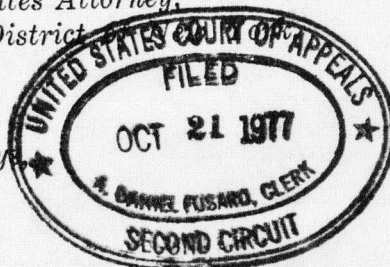


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Preliminary Statement

Edward Moore and William Laing appeal from judgments of conviction of the United States District Court for the Eastern District of New York (Costantino, J.) entered on May 17, 1977, following a three week jury trial. Appellants were both convicted of conspiracy to possess and utter forged United States Treasury checks which were the contents of letters stolen from the United States mail, in violation of Title 18, United States Code, Section 371, and of ten substantive counts of violating Title 18, United States Code, Sections 495 and 1708 as a result of the unlawful possession and uttering of specific stolen and forged Treasury checks. William Laing also appeals from his conviction in the same trial on three counts of willful misapplication of credit union monies in violation of Title 18, United States Code, Section 657, and three counts of perjury before a federal grand jury, in violation of Title 18, United States Code, Section 1623.

Appellant Moore was sentenced to four years incarceration, and appellant Laing to two years incarceration, on each count under which they were convicted, the sentences to run concurrently. Both are on bail pending the determination of this appeal.

On appeal, both appellants attack as unfairly prejudicial certain questions asked by the prosecutor on cross-examination of appellant Laing. In addition, appellant Moore argues that the trial court erred in admitting in evidence tape recordings of a conversation between himself and a Government witness, while appellant Laing contends that the trial judge abused his discretion with respect to his handling of the jury deliberation.

Statement of the Case

The evidence at trial showed the following:

From approximately January 31, 1974, until approximately April 25, 1974, appellants Moore and Laing were engaged with others in a conspiracy to fence hundreds of forged United States Treasury checks and other checks stolen from the mail. The checks were received by Moore at two locations in Brooklyn. Although at first both were health food stores operated by Moore, one was later converted into the Universal Science Church of God, of which Moore was the pastor and Laing was an incorporator. The stolen checks were deposited into the church account held jointly by Moore and Laing and into a personal account of Moore. Both accounts were situated at the Brownsville Community Federal Credit Union, of which Laing was the manager.

The testimony of co-conspirators Melvin Shelton, Robert Lee Collins and Jacqueline Murphy revealed that Moore purchased the stolen checks from these individuals

at one-half of face value (T. 70-74, 136-38, 247-54).^{*} A bookkeeping system was established by Moore, whereby each of his sources was assigned an identifying letter which was marked on the checks. Moore usually insisted that the checks be signed before they were brought to him, although Murphy remembered having forged a Brooklyn Union Gas Company endorsement on her own welfare check in his presence (T. 253-54). In February or March of 1974 Shelton helped convert Moore's health food store on St. John's Place into a church. According to Shelton, Moore said it was being converted to a church "to draw less heat because so many people were coming in" to cash checks (T. 76).

Antonia Riley, who worked for Moore at the church from March until July 1974, testified concerning occasions when people met with Moore in his office in the rear of the church. After they left, Moore's practice was to leave the church and go to the credit union with bundles of green and brown checks, sometimes as large as two to three inches thick (T. 314). She remembered these transactions taking place approximately five days a week—every day she worked, except Saturdays (T. 342). Some weeks after she began working for Moore, she questioned him about the source of the checks and was told by Moore not to worry "because he wasn't going to get in trouble and he didn't put his name on any of his checks and he had a good connection with the post office." (T. 331). Later on during the course of her employment, a mailman named Cain came in to the church to meet with Moore. Riley was handed a bundle of government checks by either Cain or Moore and instructed by Moore to add them up. The total was approximately \$32,000 (T. 319-20). On another occasion Riley, along with another em-

^{*} References preceded by the letter "T." are to pages of the trial transcript.

ployee and Moore's wife, was instructed by Moore to enter the payees' names on various stolen government checks onto the church membership lists, although they were not parishioners of the church (T. 350-351).

Elvira Valentin, a clerk teller at the credit union, recalled Moore making deposits of welfare, social security and government checks almost daily between early 1974 and April of that year. She remembered few, if any, cash deposits by Moore and recalled no one except Moore who made deposits into these accounts (Tr. 418-19, 451, 479). Both Ronald Remsen, the credit union's bookkeeper, and Elvira Valentin testified that the invariable practice of the credit union, as directed by Laing, was to require a customer's endorsement whenever cashing or depositing a third-party check (Tr. 421-22, 486, 492). Elvira Valentin recalled an argument with Moore about the handling of the third-party checks brought in by him for deposit. Following the credit union's standard procedure, she told him to endorse the checks. He responded that he had spoken to Laing and been told that "the only thing he had to put on the back of the check was the account number." She consulted Laing and he confirmed this unprecedented arrangement (Tr. 422). Sometime later, in approximately March, Moore refused to put even the account number on the checks he was depositing. When Valentin brought this development to the attention of Laing, she was instructed to write the account number on the checks herself (Tr. 422-23, 463). Valentin observed Moore meeting with Laing every time Moore came to the credit union (T. 452, 419).

In a tape recorded conversation between Jacqueline Murphy and appellant Moore which was received in evidence during the course of the trial, Moore urged Murphy not to implicate him and stated that he was "too smart" ever to endorse checks deposited at the credit union (Exhibit 2).

Dorothy De Vouse, former Vice-Chairman of the credit union's board of directors, testified that at a directors' meeting attended by both Moore and Laing in June of 1974, Moore made a number of statements (flatly contradicted elsewhere in the record) concerning his dealings with the credit union, including the assertion that he always endorsed the checks which he deposited in the credit union. Ms. De Vouse testified that none of these misstatements were commented upon or corrected by Laing (T. 616-632).

Among the more than 500 documentary exhibits, a variety of books and records of the credit union showed the scope and operation of the conspiracy. Daily tally sheets of deposits and withdrawals from March 1 to April 26, 1974, showed that checks deposited by Moore accounted for the great majority of all business transacted by the credit union during that period (T. 442-46, 518-19; Exhibits 3-1, 3-55, 5-1, 5-55). Individual members' ledger sheets showed the deposit of over \$195,000.00 into the accounts maintained by Moore and by Moore and Laing jointly (Exhibits 8-1, 8-3, 18). The vast majority of the 88 withdrawal slips received in evidence showed personal authorization by Laing of multi-thousand dollar withdrawals from these accounts, both before and after postal inspectors advised him that the accounts were being used as a conduit for stolen checks (Exhibit 9). Debit vouchers conceded to be in Laing's handwriting showed knowledge by Laing of thousands of dollars of charges against Moore's accounts for bounced checks during the month and a half preceding the postal inspectors' visit to Laing, contrary to Laing's disclaimer of knowledge prior to the inspectors' visit (Exhibits 14-1 and 14-2). The Government also showed that Laing received a \$1,000 payment by check from Moore at a time when the credit union's directors (June 1974) were questioning Laing concerning Moore's activities and well after Laing claimed to have severed his relationship with Moore (T. 1248ff; Exhibit 28).

Appellants Moore and Laing both took the witness stand on their own behalf, each asserting that he was the victim of his co-defendant's machinations (T. 816-1321).

In summation, counsel for each appellant sought to maintain his own client's innocence by shifting responsibility to the co-defendant in trial (T. 1394-1441).

After deliberation for over two days, the jury returned a guilty verdict as against both defendants on all counts (T. 1531; Laing Appendix, 17A). A poll was requested by counsel for appellant Laing (T. 1531; Laing Appendix, 17A). During the course of the poll, Juror number three stated that he had a reservation as to Counts One and Eight (T. 1532 and 1533; Laing Appendix, 18A and 19A). After reminding the jury that no juror should abandon his conscience in reaching a verdict, the Court continued the poll and determined that the guilty verdict was unanimous as to both defendants on all counts except for the uncertainty expressed by juror number three as to Counts One and Eight (T. 1538). At this point the Court accepted a partial verdict and sent the jury back for further deliberation on Counts One and Eight (T. 1538). The jury subsequently returned a guilty verdict against both defendants on these two remaining counts (T. 1540). A fresh poll of the jury confirmed the unanimous verdict on these counts (T. 1542). After the poll the court questioned the jury as a whole as to whether anything said by the Court had in any way swayed any juror's conscience in reaching a decision (T. 1542-1543). After a negative response to this inquiry, the Court accepted the verdict (T. 1543).

ARGUMENT

POINT I

Cross-Examination of Appellant Laing by the Prosecutor Was a Proper Exploration of Appellant Laing's Defense Theory.

Appellants claim that during cross-examination of Laing the Assistant United States Attorney engaged in a series of "opinion-loaded" questions which placed the prosecutor's personal belief in Moore's guilt before the jury (Moore brief, 11). This claim is frivolous.

During the course of over two days of testimony, Moore maintained that he and his accounts at the credit union were innocent victims of Laing's criminal activities (T. 816-1001). After Moore rested, Laing took the stand and asserted the contrary—that he had innocently become involved with Moore in what he believed were legitimate business enterprises, and only later learned of their criminal nature (T. 1002-1321). In short, each appellant's defense assumed his co-defendant's guilt. A major theme of each of the defense summations, in fact, was the guilt of the other defendant.

On cross-examination of Laing, the Assistant attempted to explore Laing's defense with the series of questions which are now complained of. The questions are attacked on the ground that they "assumed that Moore's guilt was a foregone conclusion at this stage of the trial" (Moore brief, 10). However, as is clear from the transcript, the questions were directed at the assumption of Moore's guilt *by Laing* (not by the prosecutor) as the basis for Laing's own claim of innocence.

The evidence showed that in the midst of the check fencing operation the defendants opened joint credit

union accounts and Laing became Moore's partner in the health food store and an incorporator of his church (See Statement of Facts, *supra*, p. 2). The challenged line of questioning explored the implausibility of Laing's claim that Moore would have invited Laing, the manager of the victimized credit union, to participate in such intimate relationships unless Laing were in fact a knowing and willing participant in the scheme. At the conclusion of this line of questioning, the assistant asked Laing the following rhetorical question:

"Wasn't it a little like Willie Sutton asking J. Edgar Hoover for a lift to the nearest bank?"

(T. 1095; Moore Appendix, 61a). Although the judge, *sua sponte*, commented that this was a "bad question", Moore's counsel did not immediately object (T. 1095-1098; Moore Appendix 61a-64a). Shortly thereafter, however, he moved for a mistrial (T. 1098-99; Moore Appendix 64a-65a). The motion was denied, but the court charged the jury that the presumption of innocence was to remain with both defendants until a verdict was returned. The jury was further instructed to disregard any question which implied the contrary (T. 1099-1100; Moore Appendix 65a-66a).

It is claimed that the "Willie Sutton" remark had the effect of equating Moore with an infamous criminal in the minds of the jurors. This contention is without merit. It is apparent that the prosecutor was no more expressing a view of Moore as the equivalent of Willie Sutton than he was expressing a view of Laing as the equivalent of J. Edgar Hoover. The question was merely an attack on the plausibility of Laing's own contention that his involvement with Moore was innocent.

The cases cited in appellant Moore's brief are inapposite. In *Hall v. United States*, 419 F.2d 582 (5th Cir., 1969), during summation the prosecutor stated that

the evidence had showed that the defendant had tampered with a witness when, in fact, there was no such evidence. In *Bruce v. Estelle*, 483 F.2d 1031 (5th Cir., 1973), the prosecution summation in a state competency hearing before a jury contained inaccurate statements regarding the effect of a finding of incompetency which were "emotional, erroneous and prejudicial." 483 F.2d at 1040. Finally, in *Gradsky v. United States*, 373 F.2d 706 (5th Cir., 1967), the government attorney during summation personally vouched for the credibility of witnesses. It was found that the remarks implied that there were facts known to the prosecution, but not in evidence before the jury, on which the prosecutor based his belief. No such tactics were employed by the prosecution here.

POINT II

Appellant Moore's Claim That a Tape Recording Was Improperly Admitted In Evidence Is Wholly Without Merit.

Among the items of evidence presented by the government in its case against Moore was a tape recorded conversation between Moore and Jacqueline Murphy (See Statement of Facts, *supra*, p. 3). The tape recording was obtained by concealing a Nagra recording device on Ms. Murphy's person with her consent. Detective David Johnson of the New York City Department of Investigation testified at trial regarding his supervision of this procedure. He accompanied Ms. Murphy to the church, watched her enter, waited outside, saw her exit and saw her enter her residence across the street. He then took possession of the recording apparatus. The equipment and tape had been previously numbered by the Department of Investigation, and Detective Johnson was able to identify the items by those markings (T. 170-74 Moore Appendix 17a-19a). The original Nagra tape recording

and machine were then offered into evidence (T. 174; Moore Appendix 19a; Exhibits 2-2, 2-3). Mr. Patton, counsel for Moore, objected to their introduction, "subject to a voir dire outside of the hearing of the jury" (T. 174; Moore Appendix 19a). The request was granted and the voir dire of Detective Johnson was held outside the hearing of the jury (T. 186-87; Moore Appendix 21a-22a).

During the voir dire the witness testified that on the day the tape was made he delivered it to the Department of Investigation, where it was placed in a locked compartment (T. 187-90; 193; Moore Appendix 22a-25a; 28a). On cross-examination of Detective Johnson, in the presence of the jury, no further questions were asked by defense counsel regarding the tape recording.

Detective Scally, custodian of tape recordings for the City's Department of Investigation, was then called to the stand. Before Detective Scally testified, Moore's counsel requested that his testimony be presented outside the hearing of the jury (T. 227). This request was denied. Detective Scally then testified in detail as to the custody records concerning the Murphy-Moore recording (T. 228-238). Following further testimony by Detective Johnson, who was recalled to the stand, the trial court found that a proper foundation had been laid for the admission into evidence of the tape recording (T. 245).

Appellant Moore contends that the trial court abused its discretion in two ways by admitting the tape into evidence. The first assertion is that the defendant was prejudiced by having only part of the voir dire testimony in the presence of the jury. He contends that the jury heard only a "truncated version" of the testimony regarding the authenticity of the tape. Although the jury was not permitted to hear Detective Johnson's voir dire, this "truncation" occurred at the behest of the defendant's counsel. Furthermore, since Detective Johnson was recalled after Detective Scally's testimony, defense counsel

had ample opportunity to bring the "full version" to the attention of the jury.

The second abuse of discretion alleged by appellant is entirely frivolous. He claims that the tape should not have been admitted because an adequate chain of custody was not established. A similar claim was raised in *United States v. Steinberg*, 551 F.2d 510 (2d Cir. 1977). There the Court stated:

"Appellant Steinberg urges that the government should have been required to prove the chain of possession of the tape recordings from the time they were made to the time of trial. No statute or court rule imposes such a burden on the government . . ." At p. 515.

Appellant's brief quotes language from *United States v. Knohl* 379 F.2d 427, 470 (2d Cir. 1967) regarding the burden on the government "to produce clear and convincing evidence of authenticity and accuracy as a foundation for the admission of [tape] recordings" (Appellant Moore's brief, 20). Notably, the tape in the *Knohl* case was held admissible despite the fact that it was a copy of a copy and the original had been lost. In that case, as in this, substantial evidence of the authenticity and accuracy of the tapes was presented and no contradictory evidence was offered. Here, Detective Johnson described in detail the circumstances under which the tape recording was made and specifically identified the original tape offered in evidence (T. 168-221; 238-245). In addition, Detective Scally described the chain of custody of the tape (T. 225-238). Indeed, in the case at bar, appellant Moore admitted that his voice was on the tape (e.g. T. 916; 918; 920) and, as explicitly stated by Moore's counsel, "He [Moore] has never taken the position that there has been tampering with the tape." (T. 926).

POINT III

The Trial Judge Exercised Proper Discretion During a Poll of the Jury Which Revealed That One Juror Had A Reservation As to the Guilty Verdict on Two of the Seventeen Counts of the Indictment.

Appellant Laing asserts that the trial judge's questioning of a juror who waived during the jury poll from his verdict on two counts of a seventeen count guilty verdict "created an atmosphere under which the jurors may have well been coerced into surrendering views they conscientiously entertained." (Laing brief, p. 20). We submit that the trial judge acted well within his discretion. He succeeded, with no degree of coercion, in isolating those counts which required further deliberation.

The jury delivered a guilty verdict for both defendants on all counts (T. 1529-31). The jury was then polled at the request of Laing's counsel (T. 1531). Upon being asked, "Is that your verdict?" juror number three replied, "It is, yes. It is, but I still have a little reservation." (T. 1532). The trial judge instructed juror number three that, "If that is not your verdict, then you must announce that it is not your verdict. And then the Court does not have a verdict and *must send you back to deliberate.*" (T. 1532, emphasis added.) Through his questions, the trial judge then ascertained that, while juror number three agreed with the jury's verdict and had intended to make it his verdict in the jury room, he developed a reservation as to two counts following the vote. After ascertaining which two counts were unresolved in juror number three's mind, the Court continued the poll and found the verdict unanimous on all other counts. The Court then properly accepted a partial verdict and returned the case to the jury for further deliberation on Counts One and Eight.

Appellant Laing contends that all seventeen counts should have been returned to the jury for further deliberation. This claim is frivolous, as it is well settled that a partial verdict may be accepted. *United States v. Barash*, 412 F.2d 26, 32 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969), citing *United States v. Frankel*, 65 F.2d 285, 288-89 (2d Cir.), *cert. denied*, 290 U.S. 682 (1933); *United States v. Cotter*, 60 F.2d 689, 690-91 (2d Cir.), *cert. denied*, 287 U.S. 666 (1932). See also, *United States v. Dotterweich*, 320 U.S. 277 (1943).

Apart from appellant Laing's attack on the acceptance of a partial verdict, the thrust of appellant's claim is that the trial Court's handling of this situation was coercive. Appellant principally relies on two cases. *United States v. Edwards*, 469 F.2d 1362 (5th Cir. 1972); and *United States v. Sexton*, 456 F.2d 961 (5th Cir. 1972). Neither case is applicable to the case at bar. The Fifth Circuit has itself characterized *Sexton* as a case in which "the court had virtually forced a juror to make a decision in open court by asking a juror, who stated that he had not voted either way, whether the verdict of the jury was his verdict." *United States v. Duke*, 527 F.2d 386, 394 (5th Cir. 1976). The error in *Sexton* is that the juror was prompted to vote in open court, and not in the jury room after further deliberation. *United States v. Sexton*, *supra*, at 967.

In the case at the bar, the uncertain juror was required neither to vote in open court nor to reveal to the Court any reasons for his dissent. After questioning to isolate the counts as to which juror number three remained undecided, the jury was sent back for further deliberation. Further deliberation was the very course of action suggested by the Court in *Sexton*. *United States v. Sexton*, *supra* at 967. *Sexton*, therefore, may be cited only as holding that the trial judge must not attempt to "extract unanimity" and must order further deliberations

or grant a mistrial. *United States v. Edwards, supra* at 1367. Clearly, the record in this case shows not even the slightest attempt at "extracting" a unanimous verdict.

Edwards is likewise clearly distinguishable. In that case the trial judge "refused to order further deliberations before receiving the final verdict." *United States v. Edwards, supra* at 1368. After a juror indicated that she concurred with the verdict of the jury but still had some doubt, the judge, *without inquiring as to the nature of that doubt*, asked again if hers was the verdict of the jury. *United States v. Duke, supra* at 394 (emphasis added). In contrast, the trial court here merely inquired as to which counts remained unresolved in juror number three's mind. (T. p. 1534). This was a proper use of discretion. The judge did not attempt to force upon, coerce, or extract a verdict from the juror. Indeed, the district judge stated:

"... your verdict must be brought within your own good conscience and it must be unanimous."
(T. 1532)

The trial Court's handling of this situation exemplifies the distinction drawn in *United States v. Duke, supra* at 394:

"There is a distinction between the conduct of a trial judge who attempts to obtain clarity and that of a trial judge who attempts to coerce a final verdict, even if that verdict is not the product of free choice by each of the jurors."

In the case at bar, the trial court's concern with avoiding a coerced result is plainly revealed in the record. After the verdict on Counts One and Eight was rendered and each juror unanimously concurred with the verdict as announced, following the poll the Court painstakingly asked the jury whether *anything* the Court said influenced any juror in their final verdict:

COURT: All right. The jury has been polled. The Court now finds the verdict as to Counts 1 and 8 is now unanimous and accepts the unanimous verdict.

In any event, the Court at this time addressing the entire jury wishes to—and you may respond in unison, if you will, as to whether or not anything that the Court has said at the time that it asked you to deliberate once again on Counts 1 and 8 had anything to do with your arriving at the verdict on those two counts.

(Whereupon the jurors responded, "No".)

COURT: Did you arrive at the verdict, including juror no. 3, after further deliberations, further discussions, and in your good conscience come to that conclusion?

(Whereupon, the jurors answered, "Yes".)

COURT: Is there anything that the Court in any way whatsoever or anyone else in this charge or otherwise may have influenced your verdict so that you thought you had to bring in a verdict on 1 and 8 unanimously?

JUROR NO. 3: No.

(Whereupon, the jurors answered, "No".)

COURT: In other words, you were not influenced? It was again your good conscience, understanding the nature of the oath, and, again, you did so because you believed that to be the proper verdict under the circumstances? Is that true of all?

JUROR NO. 3: That's true. (T. 1542-43).

Thus, the record clearly shows that the trial judge exercised proper discretion in handling this situation while protecting both the defendants and the integrity of the jury.

CONCLUSION

**The judgments of conviction against appellants
Moore and Laing should be affirmed in all respects.**

Respectfully submitted,

Dated: Brooklyn, New York
October 21, 1977

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* The United States Attorney's Office wishes to acknowledge the assistance of Linda Katz and Charles Rose in the preparation of this brief. Ms. Katz is a third year student at the New England School of Law and Mr. Rose is a second year student at Brooklyn Law School.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

DOLORES M. BYRD

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 21st day of October 19 77 he served a copy of the within
BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:
JOHN D. PATTEN, ESQ., 80 BROAD STREET, NEW YORK, NEW YORK

MARTIN E. FIEL, ESQ., ONE ROCKEFELLER PLAZA, NEW YORK, NEW YORK 10020

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

Sworn to before me this

21st day of October 19 77

Barbara A. Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979